SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 912

CONTRACTORS CARGO COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEALERS TRANSIT, INC., PROGRESSIVE TRANSPORTATION CO., and J. H. ROSE TRUCK LINE, INC.,
Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

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MOTION TO AFFIRM.

Pursuant to Rule 16.1(c) of the Rules of this Court, intervening defendants, Dealers Transit, Inc., Progressive Transportation Co., and J. H. Rose Truck Line, Inc., Appellees herein, (hereinafter respectively called Dealers Transit, Progressive, and J. H. Rose, or Appellees), move to affirm the judgment of The United States District Court, Central District of California[1] a Statutory Court of three Judges,[2] affirming the De-

[1]Not yet reported but copy attached to Appellant's Jurisdictional Statement as Appendix "A".

[2]In action under 28 U.S.C. 1336, 1398, 2284, and 2321-2325.

cision of the Interstate Commerce Commission,[3] and as grounds for such motion say: THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Statement of the Case.

Appellant is a California corporation, with its principal office located in the Central District of California and conducts business as a contract motor carrier under a permit issued by the Interstate Commerce Commission. As pertinent here, Appellant's permit authorizes motor contract carriage over irregular routes of construction materials and contractor's machinery, supplies and equipment, as follows:

(1) Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada within a hundred miles of such railheads; or

(2) Between such construction projects or points in use and the nearest railhead, when none is located within a hundred miles thereof.

Their permit was issued initially to Ellsworth Pexton in Docket No. MC-17745 (Sub-No. 1), 13 M.C.C. 369 (January 6, 1939). Pexton transferred the permit to Constructors Transport Co., and the latter transferred it to William A. Hufnagel, doing business as Contractors Cargo Company. Appellant corporation acquired the permit by assignment from Hufnagel. By

[3]Reported at 105 M.C.C. 683.

various transfers of corporate stock in 1962 and 1963, Clark & Wheeler Engineering Co., Inc., acquired all stock of Appellant corporation.

By application filed March 2, 1962, Appellant sought clarification of its permits and, in the alternative, in case the Commission did not accept Appellant's interpretation of its permits, an extension of its authority to operate as a contract carrier by motor vehicle, over irregular routes, of construction materials and contractor's machinery, supplies, and equipment between points within a radius of one hundred miles of all railheads in the six states and construction projects or other points of use within a radius of one hundred miles of all such railheads. Subsequently, a number of motor carriers filed a complaint with the Commission charging that Appellant had been exceeding the scope of its authority. The Commission also instituted an investigation on its own initiative of Appellant's operations. The three proceedings were referred to an Examiner to be heard on a common record.

Appellant contended before the Commission that the authority in Paragraph (1) is non-radial as established by the absence of certain words commonly found in radial types of authority, namely, the words "between . . . on the one hand, and, on the other. . . ."

The Commission, Division 1, found that it was unable to determine from the permit whether radial or non-radial operations were authorized in the first paragraph as set forth above, that the language of the permit was contradictory and unclear, that Appellant's permit was patently indefinite and ambiguous, and that the record in the proceeding underlying applicant's permit (*Perton*

Extension of Operations—Coast States, 13 M.C.C. 369) had to be examined in order to aid in its interpretation. The Commission, Division 1, concluded, in 96 M.C.C. at page 312:

> "It is clear, therefore, that both the first and second paragraphs of the pertinent parts of applicant's permit contemplate radial operations between railheads, on the one hand, and, on the other, construction projects or other points of use; that the 100-mile radius in the first paragraph must be drawn from the 'railhead' actually used by applicant in serving a particular construction project or point of use; and that no service is authorized in the second paragraph to or from railheads or other points of use outside the six states named in the first paragraph."

The Decision of the Division was affirmed by the full Commission (105 M.C.C. 683), and the Commission issued a Cease and Desist Order on September 1, 1967, effective November 16, 1967, barring Appellant "from exceeding the territorial scope of its permit".

The United States District Court, on November 14, 1967, issued a temporary restraining Order preventing the Commission from enforcing its Order. In the District Court Appellant sought a review only of the Commission's determination of the territorial scope of Paragraph (1) of its permit as being radial rather than non-radial, and that the Cease and Desist Order be vacated. Appellant did not challenge the fact that if the Commission properly looked at antecedent material then its interpretation of the permit was correct. Appellant's contention was that the Commission failed to apply proper principles governing the interpretation of

the permit, erred in finding that the permit was patently ambiguous, ignored the rules applicable to the delineation of radial and non-radial operating authority, erred in referring to extraneous matters for the purpose of construing the permits, and failed to consider the Appellant's status as an innocent purchaser.

The lower Court found that the certificate was ambiguous, and the Commission properly resorted to the record to aid in its construction. The Court further found that the Commission's Order was within its statutory authority, was reasonable, and was based on adequate findings supported by substantial evidence in the record. The Court refused to give special consideration to a good faith purchaser where the language of the permit presented such a glaring error or inconsistency that such purchaser should be placed on guard. The temporary restraining Order therefore was vacated, and judgment was granted for the defendants.

Parenthetically, Appellee notes that in Appellant's statement of the case it comments:

> "Based on service conducted and held out by its immediate predecessor and on its own understanding of the language, Appellant thereafter regarded its permits as non-radial authority to operate between any two railheads. . . ."

Appellant's statement that its reliance was "based on service conducted . . . by its immediate predecessor", is contrary to the evidence submitted at the hearing. At the time of purchase, the record reveals that Appellant's predecessor was almost defunct as a carrier, having but one effective contract, and owning no equipment. (105 M.C.C. 694, Tr. 148, 149).

AUTHORITIES AND ARGUMENT.

Appellant presents three questions which Appellant says are so substantial as to require "plenary consideration by this Court." The fact is, however, that this case poses no new or unusual issue of law. The basic question is whether the Commission's findings concerning the ambiguity of the language involved in Appellant's permit is rational and as a consequence its construction of the permit is supportable. Intertwined with this question is whether the Commission is required to use the words "between . . . on the one hand, and on the other . . ." in effectively establishing radial authority.

All parties and the Court below agreed that the threshold question is whether the certificate is indeed ambiguous on its face. Certainly, the certificate speaks for itself, unless it be patently indefinite or ambiguous. Absent such ambiguity, extraneous matters may not be referred to in order to interpret the permit, particularly when it is held by an innocent purchaser. *McCormick Trucking Company v. United States*, 251 Fed. Supp. 526 (D.N.J. 1966). The Commission, Division 1, acknowledged this requirement and stated (96 M.C.C. 311):

> ". . . after carefully reviewing the pertinent parts of applicant's permits, we are unable to conclude whether radial or non-radial operations were authorized in the . . . paragraph quoted above, and in other respects we find the language employed in the above-quoted passages to be contradictory and

unclear. Consequently, we conclude that applicant's permit is patently indefinite and ambiguous and that the record in the proceedings underlying applicant's permit must be examined in order to aid in its interpretation."

The Court below agreed that the permit was patently ambiguous and stated:

> "Plaintiff interprets the second paragraph of its permit to authorize non-radial operations between any two railheads in the six states, between any two construction projects or other points of use in those states within 100-miles of any railhead in the six states, and between a railhead in any of the named states and a construction project or other point of use in the states within 100-miles of a railhead, or, where there is no railhead within 100-miles of a particular construction project or point of use, between the project or point of use and the nearest railhead.
>
> "The permit likewise may be construed, without violence to the language, as allowing radial service between railhead and construction project or other point of use within the circumscribed area.
>
> "The Court finds that the certificate is ambiguous, and the Commission properly resorted to the record to aid in its construction."

Appellant itself has adopted conflicting interpretations of its certificate. Appellant's position before the lower Court concerning delineation of the territorial scope of its permit was at variance with its prior positions be-

fore the Commission. In its brief to the lower Court, Appellant stated (Brief p. 27):

> "Lastly, the only operations which can be performed under the permit in question *are within the six-named states, and plaintiff does not urge otherwise.*" (Emphasis supplied).

In its brief to the Examiner, however, Appellant did urge otherwise. Appellant stated (Brief to Examiner, p. 33):

> "The permit further provides that when no railhead is located within 100-miles of a construction project, or a point of use in any one of the six named states the transportation may be between such construction projects or other points of use and *the nearest railhead regardless of whether other such railhead is in one of the named states or another state.*" (Emphasis supplied).

This interpretation was also urged by Appellant in its Exceptions to the Examiner's Report (p. 84): and is specifically referred to by the Commission at 96 M.C.C. 309.

In Appellant's own words, therefore, the permit admits of two distinct interpretations—merely to points within the six named states, on the one hand, or, on the other, encompassing additional states.

As the Commission Examiner aptly commented at the hearing ". . . as I have heard the testimony we now have three separate interpretations (Tr. 172)." All were by Appellant. It is submitted that Commission's and the lower Court's determination that the permit is ambiguous is not clearly erroneous—the legal standard upon which review is based—if for no other reason than

the Appellant itself and its counsel have advanced inconsistent interpretations as to the meaning of its own permit and admit that different interpretations are possible.

If the certificate is found to be patently ambiguous, Appellant did not challenge the fact that if the Commission properly looked at antecedent record, then its interpretation of the permit is correct.

Appellant next contends that the words "on the one hand" and "on the other hand" delineating radial type services which must begin or end at a base point or area, have been "exclusive and, from the standpoint of constructing radial authority, their use has been mandatory". While it is true that the Commission has used such language in its authorities to indicate a radial type grant, the Commission has never indicated that it is mandatory that radial authorities have such language. It is apparent that the language here has the same connotation and should be accorded the same effect without such language. As to the words of extremity, the lower Court stated:

> "No case has been cited, either to this Court or in the course of the Commission proceedings, wherein radial authority has been granted without use of the words above quoted. Neither does it appear that the phrases are touched on by whose presence or absence the permit must be construed."

Appellees contend that the real issue in this case is that the permit, when read as a whole, with its redundancy and dependent last clause, does not, in plain english, authorize an unlimited service between railheads. Unlike most interpretation cases where the

plain English meaning tends to support an Appellant's position, here, the plain meaning of the permit as a whole negates Appellant's interpretation.

Finally, Appellant asserts that it should receive a special position as a "good faith purchaser". In light of the operations of the corporation when Appellant assumed control, and the obvious ambiguity on its face recognized by Appellant as noted above, Appellees submit that the lower Court assumed the proper position when it stated:

> "A good faith purchaser does not merit special consideration where the language of the permit presents such a glaring error or inconsistency that he should be put on guard. *McCormick Trucking Company vs. United States, Supra.*"

Appellees, Dealers Transit, Progressive, and J. H. Rose respectfully submit that the judgment of the District Court should be affirmed, and so pray.

Respectfully submitted,

KNAPP, GILL, HIBBERT & STEVENS,
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